No. 2475

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHOY GUM, sometimes referred to as Lo King,

Appellant,

vs.

SAMUEL W. BACKUS, as Commissioner of Immigration at the Port of San Francisco,

Appellee.

BRIEF FOR APPELLANT.

GEO. A. MCGOWAN,
Attorney for Appellant.

Filed this .....*day of November, 1914.*

Filed

FRANK D. MONCKTON, Clerk.

By NOV 7 - 1914 .....*Deputy Clerk.*

F. D. Monckton,
Clerk.

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Statement of the Case.

This case comes before this Honorable Court upon appeal from the decision of the United States District Court for the Northern District of California in refusing to issue a writ of habeas corpus and sustaining the demurrer interposed by the respondent (the appellee herein) to a petition for a writ of habeas corpus upon behalf of Choy Gum, sometimes referred to as Lo King, the appellant herein, in which it was sought to prevent her deportation as

an undesirable alien. The facts of the case will be set forth and thereafter will be recited the statutory authority for such executive deportation proceedings, and also those portions of the regulations under which such hearings are held in so far as the same have any bearing on this proceeding.

This appellant was one of a number of occupants of a Chinese rooming house at No. 5 St. Louis alley, in the City and County of San Francisco, State of California, when near midnight of September 19th, or the early morning of September 20, 1912, certain immigration officials and different members of the police force of the City and County of San Francisco, with great force and violence, hammered and broke their way into the said premises and found therein quite a large number of Chinese men and women, and of the people so found three Chinese women, of which this appellant was one, and a Chinaman by the name of Wong Go, were taken into custody, placed in the city prison over night, and on the following morning taken in a taxicab to the Angel Island ferry, and thence removed to the Immigration Station at Angel Island where each of the four persons were examined by Immigration Inspector-in-charge F. H. Ainsworth, who was a member of the party making the arrest hereinbefore mentioned. Choy Gum, this appellant, being sworn to tell the truth in her own matter, testified in substance as follows:

> "My name is Choy Gum. I have no other name. I am 21 years old. My father is Choy Keung. He has no other name. My mother

is Fung Shee. My father's village (in China) is Lai Lung (Leung). My father is now in the United States, and my father died when I was a little girl. (Tran. 13.) My mother always resided in that village before she came to the United States. She was there when I was a little girl. My mother died long ago in the United States when I was a little girl. She came with me to the United States when I was two years old. I was born in that village in China, and I came to the United States nineteen years ago. I do not remember the steamer. My father came with us at that time. My father is now at Isleton, and I saw him there a little over a month ago. I was engaged to a man once, and he died, and I have not married. I do not follow any particular life. Sometimes I come out from the country, and I stay there.

Q. This place where you were found this morning is a well known house of prostitution. (Tran. 14.) How long have you been living there?

A. I did not know it. I have been staying there for the last two days.

I went there with a woman. I know this woman pretty well, but I did not arrange as to how much I should pay. She was an old lady. I just called her Ah Moo, meaning aunt. I do not know where she is now. That was not the woman who was in the house this morning. I did not investigate, and I do not know if she is the woman who keeps that house. I do not know if she is the landlady. I did not investigate. I ate last night at her place, but yesterday I ate at another place. I heard a noise outside of people trying to break in. People ran, and I just followed them. No no directed us, but I just followed. I saw the people going that way, so I just followed." (Tran. 15.)

Leong Toe, another Chinese woman taken into custody at the same time, was also examined by the same Inspector, and in the same manner, she being sworn to tell the truth in her own matter. She testified in substance as follows:

"I am Leong Toe. I have no other name. I am 23 years old. My father's name is Leong Gum. He has no other name. I do not know my mother's name. She died when I was a little girl. She died in China. She had always lived in her home village. My father is in Hongkong, and has never been in the United States. (Tran. 16.) I came to the United States S. T. 1st year, second month on the 'Chiyo Maru', as the wife of Low Shee Yow. He is now in the country. The last I saw of him was a little over a year ago. I do not live in that place where I was arrested. I live at 773 Pacific Street.

Q. I want to know how long you have been staying at this house of prostitution where you were arrested this morning?

A. I went there to visit about seven o'clock last night, and I talked to my friend until it was very late, and I decided to stay there for the night, until the officers came in and broke the door.

I do not know the name of the friend that I went to visit. People call her Ah So (meaning a madam). She was not brought over here this morning. She works there at that house. She was there this morning when I was arrested. It is not a fact that I have been practicing prostitution in that house." (Tran. 17.)

Ton Yook Lan, another Chinese woman taken into custody at the same time, was also examined by the same Inspector, and in the same manner, she

being sworn to tell the truth in her own matter. She testified in substance as follows:

"My name is Ton Yook Lan. I have no other names. I am 16 years old. My father is Tom Bock. He has no other names. My mother is Hor Shee. She is dead. She brought me here from China last year, and then (Tran. 18) she went back herself and died. I do not remember the steamer, but it arrived about a month before Chinese New Year. The steamer had one black smokestack. Just my mother and myself came on the steamer. I have two brothers and one sister here. I was landed once before. I went back to China when I was seven years old. I do not mean I was landed once before—I went back to China when I was seven years old, and I come back here when I was fifteen years old. My mother went back to China when I did with my brothers and sister. My father died before I went back to China. While there we lived in the See Jee Tow village. My mother always lived there. I was born in San Francisco in the store of Quong Qing Tai—my father was in business. (Tran. 19.)

Q. How long have you been living in this house of prostitution?

A. I went there day before yesterday from Stockton—my brother took me there to study English and it being too hot I just came down here for a change of air.

Q. You know this is a house of prostitution?

A. People told me it was a ladies' boarding-house kept by Ah Gum.

Q. Was that the lady you saw there this morning?

A. Yes, that is my godmother.

I do not know where she was born. She is not really my godmother. I just called her that. Yes, the other girls there had men in their rooms overnight.

Q. This man that was in there told me that he spent the night with one of those girls; do you know anything about that?

A. I don't know about that—I didn't see him in her room but I saw him coming out of an adjoining room.

None of those men made any advances to me while I was there. I did not know that that place had the reputation of an immoral house. I only stayed there a few nights, that is all. I did not pay any board to Ah Gum. She wanted to be my godmother, and I (Tran. 20) don't have to pay her anything. I was staying in a rooming house in Stockton. That place was occupied by a few boy students. There are no other women. The street is next to the street where Chinatown is. The number of the house is 14, but I do not know the name of the street. My brother's name is Ton Bing Lan. He is working in the Quong Tak store until he got a telegram that my mother is dead, and he went back. I did not mean to tell you that my brother brought me to the house the night before. I meant nobody took me there to the house. The fat lady invited me to the house. I have not had sexual intercourse with any man. I lost my virginity in China. I have not had any intercourse with any man since I came to this country." (Tran. 21.)

Wong Go, a Chinese man taken into custody at the same time, was also examined by the same Inspector, and in the same manner, he being sworn to tell the truth in his own matter. He testified in substance as follows:

"My name is Wong Go. I have no other name. I am 24 years old. My father's name is Wong Suey San. He is also named Wong Foo. He has no other names. He is a mer-

chant of Sin Fook Chong, Stockton, at the corner of Washington street and another street, the name of which I do not remember. (Tran. 22.) I have forgotten my mother's name. I have heard it, but I do not remember it. My mother is in China. My father has also returned to China. He is in the Lung Fat village in the H. S. district. That has always been the village of his residence, and that of my mother also. My father has only left that village to come to the United States, and my mother has always lived in that village, and has never been away from it on any pretext. My father has only had one wife. I have one younger brother, and no sisters. I do not know this brother's name as I left China before he was born. (Tran. 23.) I left China and arrived here K. S. 28, 10th month (November, 1902). I am staying at my father's store in Stockton. I was not arrested in Stockton. I came up from there. My father still has an interest in this store in Stockton, and he expects to return to the United States. I do not remember what year he went to China. It was about three or four years ago. I think my mother was living in China when I left there, but I forgot suddenly what I called her ten years ago. She had bound feet. I get my living and my income to live on from the store where my father has an interest. I do not know how much interest my father has got in that store. I receive an income of a little over $300.00 a year, that is my only source of income. (Tran. 24.) I do not know how much my father receives besides what I got. The manager attends to it. The manager's name is Wong Suey Sing. I am general helper in the business in that store in Stockton. Sometimes I do a little delivery. Sometimes I sell things. Yes, I receive pay for my services, a little over $300.00 a year salary. My father gave me

$500.00 or $1000.00 interest, I do not remember which. I do not receive any income from the store from my father's investment. The three hundred dollars a year which I receive from the store is in return for my services. I am not married, and have never been married. I have never returned to China since I came here. I have made no trips. I left Stockton this time four or five months ago. (Tran. 25.) I have always lived in San Francisco ever since during that period. For my living during the four or five months that I have been in San Francisco I sent the money from Sun Fook Chong." Hearing adjourned.

Hearing resumed later with a change of interpreters.

"My source of income while in San Francisco was that I saved money from raising potatoes and speculation. I did not raise potatoes myself, but I invested some money about four years ago. No, I do not mean that I have leased or owned a piece of land upon which potatoes are raised, but I invested some money with some people who have land. Hong Ah Lung is one of them. He is a farmer in Stockton. I invested in this potato enterprise $600.00. (Tran. 26.) I obtained this $600.00 by borrowing some of it, and some I had saved up.

With respect to the house in which I was arrested this morning, I did not live there, but I just visited there. I room on Jackson street above the store of Tai Seng. I do not know the number. I am a stranger in San Francisco. It is on Jackson street above that store. I went to visit in this house where I was arrested a certain man, but I do not know his name. Yes, I was with three girls trying to escape.

Q. Is it not a fact that you went to visit one of those girls?

A. I intended to have a feast up there in that place.

I was going to have a feast, but I did not have it. None of those girls were going to join me. I did not intend to visit those girls at all. I expected to meet a friend there. His name is Ah Gum. He was one of the men arrested and released afterwards. (Tran. 27.) He is the only one in that house that I know. I do not know the number of the room I occupied in that house last night. It was a vacant room. I do not know who owns that rooming house. I did not have to pay any rent. I went there to visit a friend. I do not know whether my friend paid for my lodging or not.

INSPECTOR'S NOTE: The woman who keeps the house is known as Ah Gum.

I never visited that house before last night.

Q. What was your purpose in trying to escape if you were simply to visit a friend?

A. I was a stranger in town and I heard a noise—people trying to break in—and I thought some of the tong men were trying to get me.

Q. Why should they try to get you?

A. I was afraid that they would make a mistake and hurt me.

I do not know the names of the girls who came down in the taxicab with me. (Tran. 28.) I have never seen any of them before. I heard the noise of people trying to break in and the girls trying to run away, and I followed them. As to why I followed the girls instead of the men when I was visiting my friend, I have to say that I thought that there was a fight going on, and I was a stranger in town. I just followed the girls. It is not a fact that I occupied a room that night with a

woman in that building. I am going to stand on that statement.

Q. And you won't change this statement if I bring evidence you occupied a room with a woman?

A. Yes; I slept with a woman last night. I do not know her name. It is one of these three. I cannot recognize her. It is one of the three that came down with me. I did not pay her for sleeping there all night. I do not know who paid.

Q. Do you mean to say that you walked into a house and walked into a room where a woman was and occupied the room with her and did not pay her (Tran. 29) anything? Why don't you tell the truth?

A. She did not sleep in the same room with me. I have no additional statement to make. I have never been arrested by the local authorities for any misdemeanor or crime. (Three Chinese girls brought in.)

Q. Which one of these three girls did you sleep with?

A. The one sitting down.

Q. (To Chinese girl indicated.) What is your name?

A. Choy Gum.

Q. And is this the man who slept with you last night?

A. No, he slept in the room next to mine.

A. No.

(Wong Go answers 'No' at the same time.)"

Thereafter Wong Go, this young man from Stockton who had been landed as a merchant's minor son, and whose father shortly thereafter went to China upon a visit, from which he has not returned, and which merchant's minor son was laboring at a salary since his entry into the United

States, and which facts presented a case which was then similar to many that the government was prosecuting for being illegally in the United States, was, notwithstanding this, released from custody; and Ton Yook Lan, this young girl likewise from Stockton who had shortly before been landed as native of this country, and whose mother had also immediately thereafter gone back to China, and died leaving her daughter behind her in this country, was also discharged from custody, notwithstanding the fact that many Chinese women arrested under similar circumstances who had claimed nativity had been subject to prosecution to prove their nativity or respectability. The fact is indeed significant that both this young man and young woman were from Stockton, found in the same place and each admitting that they had gone to visit a person by the same name, Ah Gum. On releasing these two persons from custody, the Immigration official thereupon and upon the 20th day of September sent a telegraphic application for warrants of arrest to "Immigration", which is the abbreviation for the Immigration Bureau, then one of the departments under the head of the Secretary of Commerce and Labor at Washington, for warrants of arrest for Leung Toe and Choy Gum, and this is immediately followed by the formal application for the warrant, and this is in turn followed by the telegraphic answer of the Assistant Secretary of Commerce and Labor issuing a warrant against Leung Toe and refusing to issue a warrant

against Choy Gum. (Tran. 30-31-32.) Notwithstanding that under the terms of this telegram of September 21st, the department refused to issue a warrant in the arrest of Choy Gum, and that she should thereafter have been discharged, she was none the less held in custody by the Immigration officials, and on the 25th of September we find them again wiring the department for a warrant of arrest, in which they represent that Choy Gum's true name is Lo King, and that she had been landed in this country on October 23, 1908, on the SS. "China" as the wife of a native, and asked if that would affect the department's attitude in issuing a warrant, and thereafter on the following day a warrant for her arrest was issued. (Tran. 33.) The warrant of arrest itself contains the following charge against this appellant:

> "That the said alien is a prostitute and has been found practicing prostitution subsequent to her entry into the United States."

The next proceeding had in this matter was on October 10th, when in response to being called upon to appear for arraignment Choy Gum appeared before Immigration Inspector-In-Charge Ainsworth, and she testified as follows:

> "My name is Choy Gum (Tran. 35). I have no other name. I arrived in the United States when two years old. I do not know anyone by the name of Lo King who arrived on the SS. 'China' October 23, 1908, as the wife of Hum Mow Hing. I did not arrive here then. I have been here since I was two years old."

Upon being shown a photograph of Lo King on the certificate of marriage Choy Gum states that it is not her picture. Assistant Commissioner Edsell then states that he had compared Choy Gum with the photograph, and stated in his opinion it was a likeness of her, after which Choy Gum was again asked if she was the person represented by the said photograph (Tran. 36), and she replied that she was not, and that she had told the truth before the interpreter before when she said that she had been here when she was two years old, and that all the statements made by her were true, and that she had understood the interpreter.

Then follows the statement of Inspector-In-Charge Ainsworth, in which he expresses it as his judgment that Choy Gum is the person represented in this record as Lo King, wife of a native, Hom King Fook, on the SS. "China" November 23, 1908, and whose photograph is attached to the record. At this point in the proceeding attorney George A. McGowan was permitted to appear on behalf of the alien and upon his statement that he had not seen or received any copy of any of the papers in the matter, and that he wished to inspect them all before taking up the defense. (Tran. 37.) Thereupon the attorney was then shown the record in the case as far as it had been written up, and which testimony consists of the testimony of Choy Gum, Leung Toe, Tong Yook Lan and Wong Goe, and thereafter the case was continued until October 24th.

Choy Gum was then arraigned, and advised of the charge against her, and told that she would have an opportunity of examining the records in the case, and to show cause, or employ counsel to show cause why she should not be deported, and asked if she wished to employ counsel, she stated that she already had an attorney present. (Tran. 38.)

While not appearing in the record, the hearing in this matter was continued from October 24th to November 7th, at which time the following proceedings took place before the said Immigration Inspector-In-Charge Ainsworth:

> "(By Inspector AINSWORTH.) This is a continuation of hearing in the Choy Gum case, under Departmental Warrant No. 53510/212, dated September 26, 1912, charging that said alien is a prostitute and has been found practicing prostitution subsequent to her entry into the United States. Mr. McGowan, what do you wish to introduce at this time?
>
> Attorney McGOWAN. In compliance with the direction of the Department as stated by you, the defense and evidence to be presented on behalf of this woman will be submitted in the form of affidavits. Preliminary to the production of those affidavits I desire to make certain protests and exceptions." (Tran. 39.)

NOTE. The second exception is the only one set forth, the first and third exceptions not now being urged before the Court on this appeal.

> "SECOND. The second exception which we desire to reserve is the incorporation in the record of the testimony of Wong Go and the

testimony of the girl, Tom Yook Lan, upon the ground that the use of the testimony as given is detrimental to the detained and it has prevented the detained from an opportunity for cross-examination, the right of counsel being denied her at the time the testimony was taken. This testimony being detrimental and being taken at a time when counsel was denied the detained, we protest and take exception to the incorporation in this record. I desire to protest against the case being closed without an opportunity being afforded the detained to have counsel cross-examine the witnesses for the Government." (Tran. 40.)

The case which we desire to present on behalf of the detained will consist of three affidavits which will be filed in the City Office this afternoon and they will reach you tomorrow morning.

(Attorney McGowan continues.) I would like to ask if the Government has anything to offer in this case further than copies of which have already been presented to the detained which consist of the statements of the three girls, Choy Gum, Leong Toe, and Tom Yook Lan, and the Chinese witness, Wong Go.

Inspector Ainsworth. There is offered in evidence affidavits of two police officers who made the raid. These are the originals and I understood you had copies.

Attorney McGowan. This is the first I have seen of them. After having inspected the affidavit of Arthur D. Layne, and the affidavit of Dennis Bohle, both of which are under date of the 15th of October, 1912, we desire to protest against the introduction of these affidavits in evidence on the ground that it is evidence presented after the detained was permitted the right of counsel and we (Tran. 41) request that an opportunity be afforded for cross-examination of these two witnesses for the Government, and in the event of this being

denied we desire to except and protest against the case being closed unless the right of counsel be afforded.

Inspector AINSWORTH. I will say, Mr. McGowan, in this respect, that the case has been awaiting the alien's showing why she should not be deported since October 10th, and the record was available at all times, and it has been postponed a number of times at the request of alien's attorney. I do not feel justified in holding it open any more and will send the record as it appears to Washington with the protest made by you being part of it.

Attorney MCGOWAN. I desire to say that this knowledge was the first intimation I had that these affidavits were in the record and I believe that the right of cross-examination should be accorded the detained, and I desire to protest at same not being done.

Inspector AINSWORTH. The instruction under which I am acting is that this hearing is informal and simply that the charge has been against this alien and she has replied thereto as seemed best to her. The protest or objection regarding the conduct of the case might properly be made in such documentary form as you may deem proper to present for the consideration of the Secretary.

Attorney MCGOWAN. We desire to protest at this limitation upon the right of counsel and this abridgment on the ability of the defendant to properly present a full and adequate defense. (Tran. 42.)

You can send the case to the Department tomorrow because my protest may be considered as a brief in itself and the case will be represented before the Department by Attorneys Stabben & Stewart, Union Trust Building." (Tran. 43.)

The affidavits mentioned as constituting the defense of Choy Gum comprise pages 43, 44, 45, 46, 47, 48 and 49 of the record of the transcript.

The first is an affidavit by Leung Tan, the lessee of the building at No. 5 St. Louis Alley from which this appellant and the other two Chinese women were taken by the Immigration authorities on September 20, 1912. Leung Tan states that he has not at any time permitted, and would not permit the use of this building leased by him as aforesaid for the use or the purpose of conducting therein a house of ill fame or questionable character, and that he personally inspected the said premises, and feels certain that they were honestly conducted as a rooming house, and that the premises were not operated or conducted as a house of ill fame, nor was there conducted in said premises a house of ill fame. That this affiant being the lessee of the building, frequently inspects the premises, and feels confident in making the assertion that there has not been conducted in said premises any house of ill fame or place of questionable character.

The affidavit of Bow Shee is to the effect that she has known Choy Gum intimately for upwards of three years prior to her arrest, and that during all of that time she was very intimately acquainted with her, and has always known her to be a woman of respectability. That she has always lived in places occupied by Chinese families of good character, and she deposes further that if Choy Gum had been following an immoral life or had been

a member or an inmate of a house of ill fame since her residence in this country, this affiant feels that she would have had knowledge of this fact, because of the fact that she saw her very frequently and also by reason of the acquaintance of this affiant with others who saw Choy Gum very frequently, and this affiant feels certain that had Choy Gum ever been following an immoral occupation that she would have known it, or would have received some information concerning it. Therefore, this affiant declares upon oath that to the best of her knowledge, information and belief as above set forth that Choy Gum had not followed a life of immorality or had been guilty of any immoral conduct or been an inmate of any house of ill fame, but on the contrary that she was a woman of respectability and associated with people of respectability, and that her character is good.

Gee Shee in her affidavit recites that she is personally acquainted with Choy Gum. That she has known her upwards of three years prior to her arrest, and that during all of her acquaintance with her this affiant has known Choy Gum as a woman of respectability and good character, and has never heard or known of her at any time following a life of immorality, or of her having been an inmate of a house of ill fame, and this affiant having associated with her during all of the time hereinbefore set forth at frequent intervals, she feels that Choy Gum could not have been of immoral character, or followed an immoral life without the same having

been known to this affiant. This affiant further advises that she has frequently seen Choy Gum, and has associated with her almost continuously for three years prior to her arrest, and that she has always known her as a woman of good character, and respectability. This affiant further declares that she is so intimately acquainted with Choy Gum that had Choy Gum been leading a life of immorality, that the same would undoubtedly have become known to this affiant, and therefore, this affiant declares upon oath that Choy Gum is a woman of good character both from the facts within the knowledge of this affiant, and on account of the high reputation that Choy Gum has of always associating with women of good character.

The joint affidavit of Toy Lan and May Sing is to the effect that these affiants are personally acquainted with Choy Gum who was arrested at No. 5 St. Louis Alley. That she is now about 21 years old, and that she has been known to these affiants continuously since she (Choy Gum) was a child. That during all of their acquaintanceship with Choy Gum she was always a resident of the State of California, and that these affiants were well acquainted with her during all of her childhood, and ever since she attained her womanhood, and during all of these times have known her to be a person of respectability, and living with good families. These affiants further declare that if Choy Gum had at any time been following an immoral life or been a member of a house of ill fame that they

feel positive that their acquaintanceship with her was such that they would have knowledge of that, as they saw her frequently, and also because of the acquaintance of these affiants with other persons who knew Choy Gum, and who had also seen her at frequent intervals, and these affiants feel certain that they would have been aware if she had been following an immoral occupation, or that these affiants would have some knowledge concerning it. Therefore, these affiants declare upon oath to the best of their knowledge, information and belief that Choy Gum has not during her acquaintanceship with these affiants followed a life of immorality or carried on any immoral conduct, or been the member or an inmate of a house of ill fame, but on the contrary that she has been a person of respectability, and that her character is good. These affiants further depose that the upstairs portion of the house at No. 5 St. Louis Alley is not a house of ill fame, but a respectable Chinese rooming house.

The above affidavits constitute the additional defense submitted upon behalf of Choy Gum.

The two affidavits which the Immigration authorities took upon the 15th day of October, 1912, at San Francisco before Chinese Immigration Inspector W. M. Gassaway, and the existence of which was not disclosed to the detained and her attorney until the final hearing upon the 7th day of November, 1912, and thus afforded Choy Gum no opportunity of

answering them, occupy pages 50, 51 and 52 of the record.

Arthur D. Layne declares that he is a police officer attached to the regular police department of San Francisco, and holds the rank of sergeant. That he has been detailed in that portion of San Francisco commonly known as Chinatown at various times during the past four years. That in said place is situated No. 5 St. Louis Alley, and that he knows the general reputation of those premises, and that it has the general reputation in Chinatown of being a house of prostitution, and was such upon the 20th day of September. This affiant further deposes that on the 20th day of September he received information that certain alien women were being held in this place, and acting in accordance with this information he visited the premises on that date, and after gaining entrance found Choy Gum and Leung Toe in said premises in an endeavor to escape to the roof by means of a ladder.

The affidavit of Dennis Bohle sets forth that he is a member of the police department of San Francisco, that he has been detailed in the Chinatown section of San Francisco most of the time for two years past. That he knows the general reputation of the premises at No. 5 St. Louis Alley to be that of a house of prostitution, and that it was such on the 20th day of September, 1912. That affiant, acting in obedience to orders, visited the premises on the said date, and in company with Sergt. Layne assisted in arresting two Chinese alien women in the

said house of prostitution situated at said place, and that at the time of the arrest of these two alien women, Choy Gum and Leung Toe, they were in the said house of prostitution making an endeavor to escape to the roof.

After a consideration of this case by the Department the appellant was ordered deported by Benj. S. Cable, Acting Secretary of Commerce and Labor upon the charge

> "That the said alien is a prostitute and has been found an inmate of a house of prostitution and practicing prostitution subsequent to her entry into the United States, and may be deported in accordance therewith."

The foregoing statement of this case is taken in a narrative form running through the entire record. The petition for a writ of habeas corpus sets forth four assignments upon which is based the charge that this appellant was detained and deprived of her liberty without due process of law in that she was denied a fair opportunity to test the sufficiency or the weight of the evidence against her, or to present her defense to the charge brought against her in said warrant of arrest. The four particulars specified are contained on pages 5, 6, 7, 8, 9 and 10 of the record, and are virtually the subject of the assignment of errors that immediately follow and for that reason need not be recited in this statement. There is a fifth allegation of the petition alleging that the appellant is and always has been a woman of good character, and is not objectionable

as charged in the warrant of arrest or the warrant of deportation. The petition for a writ of habeas corpus had annexed thereto a copy of the executive hearing before the Immigration officials. The respondent interposed a demurrer to this petition which is contained on page 55 of the record which alleged that the petition does not state facts sufficient to entitle the petitioner to an issuance of a writ of habeas corpus.

The Immigration Act of February 20th, 1907, as amended by the Act of March 26th, 1910, recites in part as follows:

> "Sec. 3. * * * Any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States * * * shall be deemed to be unlawfully within the United States and shall be deported in the manner provided by sections twenty and twenty-one of this Act. * * *"
>
> "Sec. 20. That any alien who shall enter the United States in violation of law * * * shall, upon the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States. * * *"
>
> "Sec. 21. That in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of this Act, or that an alien is subject to deportation under the provisions of this Act, or of any law of the United States, he shall

cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came, as provided in section twenty of this Act. * * *"

"Sec. 22. That the Commissioner-General of Immigration * * * shall under the direction of the Secretary of Commerce and Labor * * * establish such rules and regulations * * * and shall issue from time to time such intructions, not inconsistent with law, as he shall deem best calculated for carrying out the provisions of this Act and for protecting the United States and aliens migrating thereto from fraud and loss. * * *"

Under the authority contained in the last section the Commissioner-General of Immigration, with the approval of the Secretary, has issued and promulgated the following regulation, which is the regulation as it was in force at the time of the hearing hereinafter complained of:

"Rule 22.

ARREST AND DEPORTATION ON WARRANT.

Subd. 4. Execution of warrant and hearing thereon.

(a) Upon receipt of a warrant of arrest the alien shall be taken before the person or persons therein described and granted a hearing to enable him to show cause, if any there be, why he should not be deported. * * *

(b) During the course of the hearing the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued; and at such stage thereof as the officer before whom the hearing is held shall deem proper, he shall be apprised that he may thereafter be represented by counsel and shall be required then and there to state whether he

desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the further conduct of the hearing, to inspect and make a copy of the minutes of the hearing, so far as it has proceeded, and to offer evidence to meet any evidence theretofore or thereafter presented by the Government. Objections and exceptions of counsel shall not be entered on the record, but may be dealt with in any accompanying brief. * * *

(c) At the close of the hearing the full record shall be forwarded to the Bureau, together with any written argument submitted by counsel and the recommendations of the examining officer and the officer in charge for determination as to whether or not a warrant for deportation shall issue."

Specification of Errors.

Specification of errors relied upon occupy pages 59, 60, 61 and 62 of the record, and may be condensed into the following four assignments. The pages noted after each specification have reference to the location in the transcript of that portion of the petition referred to in specification.

"First. That the Court erred in holding that it was not an abuse of discretion by the immigration authorities, and did not deprive the alien, the petitioner herein, of a fair hearing, to incorporate in the record against the said alien the testimony of Leong Toe, Ton Yook Lan and Wong Go, which said witnesses had been sworn to tell the truth touching the legality of their own residence in the United States, and not the legality of the residence of

this alien, the petitioner herein; and who were self-interested witnesses, seeking self-protection and liberation, and who, under promise and hope of immunity, testified to the detriment of the petitioner; and in refusing to set a time and place for the examination of the said witnesses upon behalf of the petitioner herein, as more fully contained in the first specification of unfairness contained in the petition on file herein. (Tran. 5 and 6.)

"Second. That the Court erred in holding that it was not an abuse of discretion by the immigration authorities, and did not deprive the alien, the petitioner herein, of a fair hearing, to conduct for the Government a hearing, and take the testimony of Arthur T. Layne and Dennis Bohle, against the petitioner, without notice to either the petitioner, or her attorney, and in their absence embody the said testimony in the form of affidavits, and thus deprive the petitioner of any opportunity to answer the same, or test the knowledge or credibility of the said witnesses; and in withholding the fact that said testimony had been so taken until the final hearing in the said matter, and then not afford the petitioner any opportunity to answer the said evidence, all as more particularly alelged in the second specification of unfairness contained in the petition on file herein. (Tran. 7 and 8.)

"Third. The Court erred, in holding that it was not an abuse of discretion, and did not deprive the alien of a fair hearing, for the Commissioner of Immigration, after the close of the Government case against the said alien, the petitioner herein, to submit evidence to the department detrimental to the said alien, the said petitioner herein, which said detrimental evidence had been previously withheld from the said alien, the petitioner herein, and no opportunity at all afforded her at any time of

meeting, or answering, the said evidence, which was clandestinely forwarded to the Secretary of Labor, and in so abridging and limiting the right of the counsel of the alien, as to prevent counsel from ascertaining all the evidence submitted against the said alien, the petitioner herein; all as more particularly alleged in the third specification of unfairness contained in the petition on file herein. (Tran. 8 and 9.)

"Fourth. The Court erred in holding that it was not an abuse of discretion, and did not deprive the alien, the petitioner herein, of a fair hearing for the immigration authorities to submit their evidence against the alien, the petitioner herein, in the form of oral examinations from the witnesses prior to according the alien the right of an attorney and to thereafter present the evidence from the Government witnesses in the form of *ex parte* affidavits, thus preventing and depriving the alien, the petitioner herein, of any opportunity of being confronted with any witnesses being presented against her, and depriving her of any and all opportunity to submit evidence of said Government witnesses upon her own behalf; all as more particularly alleged in the fourth specification of unfairness contained in the petition on file herein." (Tran. 9 and 10.)

FIRST.

"That the Court erred in holding that it was not an abuse of discretion by the immigration authorities, and did not deprive the alien, the petitioner herein, of a fair hearing, to incorporate in the record against the said alien the testimony of Leong Toe, Ton Yook Lan and Wong Go, which said witnesses had been sworn to tell the truth touching the legality of their own residence in the United

> States, and not the legality of the residence of this alien, the petitioner herein; and who were self-interested witnesses, seeking self-protection and liberation, and who, under promise and hope of immunity, testified to the detriment of the petitioner; and in refusing to set a time and place for the examination of the said witnesses upon behalf of the petitioner herein, as more fully contained in the first specification of unfairness contained in the petition on file herein." (Tran. 5 and 6.)

This appellant, Choy Gum, feels that she has been very much aggrieved, injured and oppressed by the action taken against her by the immigration authorities, and that she is being deprived of her liberty, and her right of residence within the United States terminated in a most summary, unlawful and arbitrary manner. According to the sworn testimony of Choy Gum and a number of her witnesses she has resided in the United States for upwards of twenty years, and upon these facts being made known to the Secretary of the Department of Commerce and Labor, he refused to issue a warrant of arrest for her. Thereafter, upon the representation of the Commissioner of Immigration for the Port of San Francisco that she had entered the United States as a citizen's wife under the name of Lo King on the SS. "China" on the 23rd day of October, 1908, the warrant of arrest was issued. Upon the hearing there was not presented the evidence of a single witness that Choy Gum was other than just what she claimed to be, the sole showing made by the Government being the statement of

Assistant Commissioner of Immigration Edsell and Immigration Inspector-In-Charge Ainsworth that in their opinion from a comparison of Choy Gum with the photograph in the record in the case of Lo King that she was one and the same person. Mistakes of identity are so usual and many that it seems an abuse of discretion that the opinion of these two officers should be accepted to overturn the sworn testimony of a half dozen witnesses. It certainly seems that if Choy Gum was Lo King, the Government would have been able to produce some witness who knew her or of her as such person to testify to that fact, and it seems an abuse of discretion to accept the opinion of these two officers as not only counterbalancing but outweighing the sworn testimony of a half dozen different witnesses, each of whom were in a position to know the truth of the matters to which they testify.

This appellant feels further aggrieved and injured that she should have been victimized and advantage taken of her by Wong Go and Ton Yook Lan, the young couple from Stockton, who to clear themselves from the trouble that they were implicated in, besmirched the character and reputation of this appellant. Wong Go as is shown by the caption which preceeded the examination was "alleged to be in the United States illegally", while Ton Yook Lan was being examined upon the same charge and for the same purpose as was this appellant and Leung Toe. It is alleged in the petition for a writ of habeas corpus that the statements of these two

witnesses was given under oath in their own matter, and that they were not sworn to testify to the truth in the case of this petitioner, and that they made self-serving declarations to get themselves out of trouble, and in an endeavor to extricate themselves from the predicament that involved them; that they were under duress of confinement when testifying, and they were seeking liberation as a consideration for the testimony which they gave to the detriment of this petitioner. While it is true that the right of counsel may not be accorded to such a person immediately after arrest, this petitioner maintains that it would have been proper and was indispensable to a fair hearing that her counsel should have been permitted an opportunity of examining these witnesses before they were discharged from the custody of the immigration officials and turned out into the world where this petitioner could not thereafter find them to secure their evidence. The Government may say that it would be inconvenient for them, and that they could not hold these two people in custody for that purpose, but this record shows that when they want to hold a person in custody they are able to do so, for it is of record herein that they held this petitioner in custody from the 21st of September, when the Department refused to issue a warrant in her case until the 25th of September, when the warrant was actually issued. If they can hold people in custody for such a length of time for one purpose, they may certainly do so for another. Counsel for the appellant was present there

at the Immigration Station daily during all of this time, and could and would have appeared to represent the appellant and examine these witnesses at any time during this detention, and it certainly prevented the appellant from a fair opportunity to present her defense when the Government refused to allow her the privilege of having an attorney represent her officially on the record herein or become acquainted with the contents of the record for her protection until after the witnesses whose testimony had damaged her had been dismissed and permitted to go their several ways, while Choy Gum was detained in custody, though a warrant of arrest had been refused.

The Supreme Court of the United States in the case of Low Wah Suey v. Backus, 225 U. S. p. 460, the Court decided as follows:

> "A series of decisions in this Court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation or that there was a manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final."

It is desired, in passing, that this Court note that Congress in authorizing the promulgation of the rules and regulations under which these hearings

are held, has provided that the regulations should be *"not inconsistent with law"*, and further, the refreshing degree of mutuality between the respective rights of the Government and the aliens, when Congress also provided for *"protecting the United States and aliens migrating thereto from fraud and loss"*.

The regulations in question were the subject of an opinion by this honorable Court in the case of Roux v. Commissioner of Immigration, 203 Fed. 413, in which this Court held:

> "These provisions indicate the solicitude of the Department of Commerce and Labor that the alien shall have a fair and altogether impartial and unbiased hearing, free from restraint or any undue influence in the manner of his defense to any charges made against him upon which he may be deported. Was the petitioner accorded such a hearing before the inspectors? * * *
>
> "Rule 22 but reflects how essential it may be for the accused to have counsel. * * *"

In the case of Low Wah Suey v. Backus, supra, the Court held that:

> "It is alleged that the rules of the Secretary of Commerce and Labor are arbitrary and illegal, particularly certain sections of Rule 35. From these rules, it appears, that, while provision is made for an examination in the absence of counsel, it is provided that a hearing shall be had at which the alien shall have full opportunity to show cause why he should not be deported, and that, at such stage of the proceedings as the person before whom the hearing is held shall deem proper, the alien shall be apprised that he may thereafter be repre-

> sented by counsel, who shall be permitted to be present at the further conduct of the hearing, to inspect and make a copy of the record of the hearing so far as it has proceeded and to meet any evidence that theretofore has been or may thereafter be presented by the Government, and it is further provided that all the papers, including the minutes and any written argument submitted by counsel, together with the recommendations, upon the merits, of the examining officer and the officer in charge shall be forwarded to the Department as the record on which to determine whether or not a warrant for deportation shall issue. Considering the summary character of the hearing provided by statute and the rights given to counsel in the rules prescribed, we are not prepared to say that the rules are so arbitrary and so manifestly intended to deprive the alien of a fair, though summary hearing, as to be beyond the power of the Secretary of Commerce and Labor under the authority of the statute."

It is to be observed that the Supreme Court states:

> "We are not prepared to say that the rules are so arbitrary and so manifestly intended to deprive the alien of a fair though summary hearing as to be beyond the power of the Secretary,"

and therefore we must look beyond the requirements of the rule to the hearing which was actually accorded under the rule as interpreted by the Immigration authorities, for it is obvious that while the rule does not contemplate a hearing so arbitrary as to deprive the alien of a fair hearing, it is none the less a fact that hearings coming under this

rule may in fact be so conducted in some instances to give a fair hearing, and in other instances to so strip the alien of opportunity to submit a defense that she is accorded nothing but the semblance of an opportunity to make a defense to the charge brought against her.

In the case at bar the two witnesses Wong Go and Ton Yook Lan are the two who gave evidence detrimental to this appellant, and whose testimony is considered under this assignment. These witnesses were in the custody of the Immigration authorities. They were actually being examined touching the legality of their own residence in this country, and it is alleged in the petition that as part of the consideration for the testimony which they gave detrimental to this petitioner they were restored to their liberty and were so actually restored to their liberty at a time and in such a manner as to deprive this appellant of any opportunity of cross-examining them. During the time in question this appellant had an attorney in attendance at the immigration station, waiting to be permitted to represent her in this case, and to acquaint himself with the record so that he could properly defend her and all of this while his service would have had some practical useful value to this petitioner while these witnesses were there in the custody of the Immigration authorities, they, the Immigration authorities, however, refused to permit the appellant to have the right of counsel when it would have been of some practical value, and de-

ferred permitting her that right, and held her thus defenseless for days after these two witnesses had been restored to their liberty, and been permitted to go their several ways, which were unknown to this petitioner. It is therefore seen upon this statement of facts that the hearing which was actually accorded the appellant was nothing but the semblance of a hearing. It cannot be said that there was any good reason for withholding the right of counsel after the Government had secured the testimony which they desired, and it was, appellant insists, an abuse of discretion to withhold the right of counsel until after the witnesses who had given testimony against her had been permitted to depart. Along this line and considering just how these statutes should be construed there are two very important cases to which the attention of this honorable Court is directed:

In the case of Redfern v. Halpert, 186 Fed. Rep. 150, The Circuit Court of Appeals passes upon how these Immigration Statutes should be construed and uses the following language:

> "The Immigration Statutes are very drastic and deal arbitrarily with human liberty, and I consider they should be strictly construed."

In the case of U. S. v. Williams, 185 Fed. Rep. 698, Judge Holt speaks very clearly about hearings of this kind. He states:

> "It is, of course, obvious that such a method of proceedure disregards almost every fundamental principle established in England and

> this country for the protection of persons charged with an offense. The person arrested does not necessarily know who instigated the prosecution. He is held in seclusion, and is not permitted to consult counsel until he has been privately examined under oath. The whole proceeding is usually substantially in the control of one of the inspectors, who acts in it as informer, arresting officer, inquisitor and judge. The Secretary who issues the order of arrest and the order of deportation is an administrative officer who sits hundreds of miles away, and never sees or hears the person proceeded against or the witnesses. Aliens, if arrested, are at least entitled to the rights which such a system accords them, and if they are deprived of any such right the proceeding is clearly irregular, and any order of deportation issued in it invalid."

To sum up the Government's attitude in these cases as it may be defined from the kind and class of hearings which they afford, it is obvious that they entirely lose sight of the fact that the defense of an alien consists of two parts; the first part in which the alien's defense may be divided consists of the affirmative showing upon their behalf by their own witnesses. The Government interposes no objection to the introduction of this defense, save that they insist that you shall make your defense in the form of affidavit; that they do not want to be bothered with taking the testimony of the witnesses. The second part of the defense which would consist of an attack upon the case made out by the Government against the alien, in other words, showing the weakness within the Government's case

itself, is denied the alien, because the kind and class of procedure which the Government follows so safeguards its evidence as to render it impossible for the alien to attack the Government's showing. The Government causes its witnesses to be examined by question and answer, while they withhold the right of counsel to the alien, and then after the right of counsel has been allowed the alien, it is too late to examine the witnesses because they have been dismissed and have departed, where no one knows. Under these circumstances it is seen that the Government does not permit the alien to attack its defense in any way, and that the class and kind of hearing which they accord safeguards their defense from attack. This manner of procedure always assures that the Government shall have some evidence as a basis for a warrant of deportation because they prevent the detained from attacking that evidence. They of course permit the alien to submit evidence which would tend to show the falsity of their evidence, but the most which the alien is permitted is to create a conflict in the evidence. The alien is not permitted to make any direct attack upon the Government's evidence by the examination of the Government witnesses, and we submit that this is nothing but the semblance of a hearing, and under such circumstances as are set forth in this case, does deprive the alien of a fair hearing to present her defense. This point is very clearly brought out in the case of Hanges v. Whitfield, 209 Fed. 675, in which it is held that:

(P. 677) "(1) The Court will not in proceedings of this character consider the testimoney or the weight thereof, if properly and fairly taken, to determine whether or not it is sufficient to warrant the deportation of an alien. That would be for the proper immigration officials to determine. But the Court may, and it is its duty to, consider the manner of procuring the testimony, its competency and legal admissibility against the petitioners, and determine whether or not they have had a fair and impartial hearing or trial." (See cases cited.)

* * * * * *

(P. 679) "True, the proceeding for this purpose may be summary, and before an executive, or other authorized official of the Government, but it must be a lawful proceeding, the charge established by competent evidence, and the aliens afforded a fair hearing and opportunity to discredit or disprove the evidence adduced against them. Such an opportunity requires that they have the benefit of counsel at every stage of the proceedings after their arrest, with the right to cross-examine witnesses whose testimony is to be used against them before the Bureau of Immigration in determining whether or not they should be deported.

"The right of cross-examination is one of the principal, as it is one of the surest, tests which the law affords for the ascertainment of the truth in all disputed matters of fact, and it is indispensable in all judicial proceedings in this country, civil or criminal, that ex parte testimony, even though given under the solemnity of a legal oath or affirmation that it is true, taken in the absence of and without opportunity at some stage of the proceedings to the party against whom it is proposed to be used to cross-examine the witnesses giving such testimony, cannot rightly be used against him."

We feel that we have submitted sufficient authority for showing that this alien has not been permitted a fair or adequate opportunity to submit her defense, and that her right of counsel has been so impaired as to be of very little value to her. We believe that the action of the Immigration officials in this case is directly in violation of the mandate of the statute and the decisions of the Supreme Court of the United States, particularly that of Low Wah Suey v. Backus, supra, and the long line of decisions which precedes it, and upon which it is based. We have upon this point made reference to Wong Go. This young man was landed in this country as a merchant's minor son, and his father shortly thereafter went to China. The boy commenced laboring at a monthly salary, and while under the decision of this Court in the case of U. S. v. Foo Duck, 172 Fed. 856, these facts would not render him liable to deportation, it is none the less a fact that the Immigration authorities have since the rendition of this decision started a campaign for the deporting of Chinese who have been laboring, out of this country, when it is shown that they entered as merchants' minor sons. These cases have reoccurred in many of the different Federal Courts over the United States, and among them may be mentioned the cases of U. S. v. Lim Yuem, 211 Fed. 1001, and the case of In the Matter of Lew Gin Shew, No. 15673, in the lower Court from which this case at bar comes. The decision has not yet been printed in the advance sheets of the Federal

Reporter. There were other similar prosecutions in the southern district of this State, and also in various other districts of the United States showing that the Immigration authorities granted this witness consideration in not prosecuting him.

With respect to the witness Ton Yook Lan it is also noted that she entered the United States claiming to be a native, and that her mother shortly afterwards went to China, leaving this young girl in this country, and under these circumstances the Immigration authorities have arrested women of this kind, and contested their right to be in this country, making them prove their nativity and respectability. One case of this character has been before this Court on a prior occasion, the case being that of Haw Moy v. North, 183 Fed. 89. It is alleged in the petition that these two witnesses were promised immunity or in other words that their testimony which was detrimental to this petitioner, was given as the result of a promise of their liberation. These witnesses gave the testimony and they were liberated, and the petition making the allegation as it does that their testimony was the result of the promise made to them, we feel that the writ should have issued so that the truth of this allegation may have been inquired into. It is certainly obvious that if the Immigration authorities or any one on their behalf made any such promise to these witnesses to induce them to testify against this petitioner and in doing so they testified falsely, the hearing was certainly unfair to an extent which would

vitiate the entire proceeding. We feel upon this point the petition does state a cause of action which is sufficient to cause to be granted to appellant the relief which she asks, which was a hearing before the Court.

SECOND.

"That the Court erred in holding that it was not an abuse of discretion by the immigration authorities, and did not deprive the alien, the petitioner herein, of a fair hearing, for the Government to conduct a hearing, and take the testimony of Arthur T. Layne and Dennis Bohle, against the petitioner, without notice to either the petitioner, or her attorney, and in their absence embody the said testimony in the form of affidavits, and thus deprive the petitioner of any opportunity to answer the same, or test the knowledge or credibility of the said witnesses; and in withholding the fact that said testimony had been so taken until the final hearing in the said matter, and then not afford the petitioner any opportunity to answer the said evidence, all as more particularly alleged in the second specification of unfairness contained in the petition on file herein." (Tran. 7 and 8.)

It will be observed that upon October 10, 1912, the right of counsel was accorded to Choy Gun, this appellant. (Tran. 38.) After that date the alien was entitled to the right of counsel as specified in subdivision 4 of rule 22. (b)

* * * "If counsel be selected, he shall be permitted to be present during the further conduct of the hearing, to inspect and make a copy

proceeded, and to offer evidence to meet any evidence theretofore or thereafter presented by the Government. Objections and exceptions of counsel shall not be entered on the record, but may be dealt with in an accompanying brief, * * *"

or as interpreted by the Supreme Court in the case of Low Wah Suey v. Backus, supra, as hereinbefore cited to the Court's attention. It further appears that a hearing was held before the Immigration Authorities upon the 15th day of October, 1912, at which the testimony of Arthur D. Layne and Dennis Bohle was taken. The hearing at which the testimony of these two witnesses was taken was held before Chinese and Immigrant Inspector W. M. Gassaway, and the testimony was taken in the form of affidavits. These affidavits while written on the official paper of the Immigration service, were actually made in the San Francisco office of the Immigration service on the lower floor of the Custom House, which is a matter of but two or three blocks distant from the office of the attorney for this appellant, and while the regulation prescribes that the alien and her attorney shall be permitted to be present during the further conduct of the hearing, no notice of any kind was given to the alien or her attorney that this hearing would take place or that this testimony then and there reduced in the form of affidavits would be taken, and the alien was thus prevented from any opportunity of being represented thereat. This breach and violation of the said regulation cannot be justi-

of the counsel for the alien is in close proximity to the San Francisco Immigration office, and her counsel would have been glad to have responded to a telephonic communication at any time to be present to represent her at said hearing. The contents of these affidavits were detrimental to the alien, and very prejudicial to her rights. This case comes clearly within the exception in the case of ex parte Pouliot, 196 Fed. Reporter, 437-442, in subdivision 7, in which said decision appears the following:

> "The claim that the petitioners were not accorded a full and fair hearing before the executive officers is based upon the fact that the inspector took certain affidavits ex parte, and in the absence of the petitioners, and reported certain facts communicated to him by third persons, to the department. There is no denial of the fact that the petitioners were given a full and fair opportunity to be heard, and that all testimony offered in their behalf was received. What amounts to such a full and fair hearing as the law contemplates has never been defined by the Courts. Perhaps the practice of submitting ex parte affidavits and of reporting independent facts is not to be commended; but the mere fact that such a report has been made, or such affidavits transmitted, will not entitle an alien to a release on habeas corpus, unless it appears that he has, or may have been prejudiced thereby. No such prejudice can be predicated on the acts of the inspector in this case. The ex parte affidavits taken, and the ex parte statements made, simply tend to confirm facts which appear in the testimony of the petitioners themselves, and could not change the result. Were I to exclude all incompetent testi-

> mony and determine the case de novo on the competent testimony alone, I could not reach a different conclusion."

The distinction between the case of this appellant and the case just cited rests in this, that in the latter case the objection was a matter of form and not of substance, in this that the affidavits recited nothing excepting that which was contained in the preliminary statements first taken from the Pouliot people, and their objection to the consideration of the affidavits therefore rested not upon a showing that the averments contained in the affidavits were untrue, and would have gone to the substance of the matter, but were simply based upon an empty question of procedure because no different set of facts was contended for or shown to have existed upon their behalf, and therefore the Court very properly in that case determined that the objectionable ex parte statements simply confirmed the facts appearing in the testimony of the petitioners, and could not have changed the result, or as stated by the judge in that case "were I to exclude all incompetent testimony and determine the case de novo on the competent testimony alone, I could not reach a different conclusion". In the case at bar an entirely different set of facts existed. There is no other evidence in the record against this appellant that the house in which she was arrested was a house of ill fame. Certainly the formal application for the warrant of arrest and the charges contained in the warrant of arrest are not to be con-

sidered as evidence or the leading complex and compound questions propounded by the examining inspector, and are not to be considered or classed as evidence, and so it resolves itself to the proposition that in this case there is no evidence of any kind in the record which shows that the premises in question were a house of ill fame, save the contents of these two affidavits, to which exception is taken. The warrant was issued upon the representation that the house in question was a place of ill fame. If the house had not that reputation, and was not of such a character, and that is the substance of the showing made upon behalf of the alien, then the case would have to fall because of the absence of any evidence upon which to base a warrant of deportation. Most of the decisions which were recited under the preceding or first subdivision of this brief are of course applicable to this point, particularly the case of Hanges v. Whitfield, supra. Upon the proposition that there must be some evidence to support the warrant of deportation, we desire to cite to the Honorable Court the cases of

Frick v. Lewis, 189 Fed. 146;
Frick v. Lewis, 195 Fed. 693;
Frick v. Lewis, 233 United States.

Upon the question of the right to examine witnesses, and that it has been accorded in different Immigration cases attention is called to the case of Siniscalchi v. Thomas, 195 Fed. 701, a decision by the Circuit Court of Appeals for the Sixth Circuit, in which it is held on page 705:

> "We are satisfied from the record that, while petitioner and his counsel were not always given notice that testimony on this subject was to be taken, still petitioner was represented by counsel in the taking of part of the testimony, and a copy of all the testimony taken in this behalf was furnished to counsel *and opportunity given to examine witnesses or to put in witnesses themselves.* Petitioner did not see fit to take advantage of the opportunity. Counsel believed that the testimony taken at Richmond was immaterial; and when on October 6, 1911, the record as then made up and all the accompanying papers were presented to counsel for inspection, it was stated that they did not wish to offer anything further in the case and were ready to have it submitted." * * *

Further upon this point it might be noted that no question is involved in this case of the right or power of the Government to produce witnesses because in this instance the witnesses actually appeared, and were before the Government officer, and this office of the Immigration service is well equipped to take the testimony of the witnesses appearing there, and it is daily their practice to take testimony in cases arising under the Chinese Exclusion laws and the Immigration laws, and no good or valid reason why the testimony of these two witnesses should not have been taken in the regular manner at that time, save for the sole purpose of depriving an alien of an opportunity to cross-examine these witnesses or submit evidence upon her behalf from these witnesses at that time.

It may be claimed that under the said regulations an alien has not the right to cross-examine witnesses, but it is apparent from the regulations that she may submit evidence, and we submit that under this right, that is the submission of evidence upon her behalf she may have questioned these Government witnesses upon her behalf, and whether their examinations are classed as a cross-examination or not, she is entitled to have the benefit of their testimony. Upon this point the attention of the Court is directed to the case of Ex parte Ung King Ieng, 213 Fed. 119, in which it is held:

> "The petitioner had no power to produce these witnesses, and if she desired to prove anything by them, or if she desired to test their knowledge of the facts to which they had testified against her, it seems to me that ordinary fairness required that she be permitted to do so. It was suggested at the argument of this question before the court that it would be a 'nuisance' to permit cross-examination. Perhaps it would, but to the petitioner the whole proceeding was probably a nuisance. The rights of the petitioner may not be wholly measured by the convenience or inconvenience to the immigration officers in affording her a fair hearing. Their efforts should be directed to the ascertainment of the truth. They have vast powers accorded them by law, and these powers should be fairly exercised. It is not necessary, of course, that prolonged cross-examinations be permitted. Much must be left to the discretion of the officer. But I am firmly of the opinion that, when the officer in this case refused to permit the petitioner's counsel to ask a single question of witnesses in attendance and testifying to important matters against

> her, she did not receive that fair treatment which the law contemplates and to which she was entitled."

It is further urged upon behalf of the appellant in this matter that she was deprived of a fair hearing in the method and manner of the presentation of the evidence of witnesses Layne and Bohle, for this reason, in addition to those heretofore cited. It appears that this evidence was taken on the 15th day of October, 1912. Not only was no notice given of the hearing at which this evidence was taken, but the fact that the evidence was taken was not made known to the alien or her attorney until the very time of the closing of her case, and when the entire record was to be transmitted to Washington. Upon this point it appears from pages 41-42 of the record that the evidence of these witnesses had not been presented, and its very existence was unknown to the alien or her attorney, and that when it was presented, a protest was made to its introduction upon the ground that it was presented after the detained was permitted the right of counsel, and a protest was made to the case being closed without affording an opportunity to the alien of cross-examining these two witnesses, and in the event of that being denied a protest was then made upon behalf of the alien to the case being closed unless the right of counsel be afforded. This phrase is *one which has been selected by the department* to designate what an alien's rights were. The trial Court felt that we should specifically have requested

Court nevertheless had knowledge of the fact, in speaking of the rules and regulations of the Department, that in the practice thereunder the right of examination and cross-examination was allowed. This fact was disclosed by the record on appeal in these cases. On page 25 of the record in the case last above mentioned, a letter was written by the Inspector-In-Charge under instructions from the Department, from which the following is an extract:

> "There is no disposition upon the Department's part to prevent as complete a hearing as may be reasonably requested. * * * It is understood that your purpose, as the attorney for Ursula Zakonaite, is similar to that of this office and Department, viz: to develop the exact facts and to this end all of the witnesses presented will be examined and be subject to cross-examination either on your part or on the part of the government, full record then to be transmitted to the secretary."

In conclusion I desire to submit that the hearing accorded the alien in this matter has been nothing but the semblance of a hearing, and that her rights have been greatly encroached upon, and she has been prevented from having a fair or adequate hearing or such a hearing as it contemplated by the statutes in such cases made and provided.

The spectacle of permitting Immigration Inspector-In-Charge Ainsworth to conduct such a raid as he claims to have made, and thus be an arresting officer, be the detective to gather the evidence, work up his case, conduct the hearing as

prejudicially as the record discloses, and then sit in judgment upon the same, and submit his recommendation and his findings to the Department, is indeed, we submit, a travesty upon the fair name of justice. No member of the judiciary would so attempt to conduct and demean himself in his official capacity, and we submit that if it is impracticable and unbecoming in a judicial officer to do this, because impartiality may not survive such prejudicial surroundings, how much more so is it objectionable for an Immigration inspector to be permitted to so act. Certainly such a course of conduct has vitally injured this appellant, and prevented her from having a fair trial, and the impartial hearing guaranteed her by the statute.

In submitting this matter your appellant prays that the order of the lower Court be reversed with directions to issue a writ of habeas corpus as prayed for.

Dated, San Francisco,
November 5, 1914.

Respectfully submitted,

GEO. A. MCGOWAN,
Attorney for Appellant.

a continuance for the purpose of meeting this evidence, but we submit as is set forth in the case of Ex parte Chooey Dee Ying, 214 Fed. 873, that these proceedings are informal in their nature. In the case just cited the Court stated page 875:

> "If the practice prevailing in the immigration service were attended with the formality and regularity generally characterizing judicial procedure in courts of law, it might therefore very properly be held, as argued by counsel for the Government, that the applicant himself is in a measure to blame for the failure of the record to disclose the fact of the question whether the comparison was made by an inspector referee the entire hearing in such a case is informal and radically different from ordinary judicial procedure. A very loose practice seems to prevail as to the time and manner of making such comparison and of bringing the results to the attention of the reviewing officer. * * * The applicant was represented by counsel familiar with the practice in the department, and his testimony leaves no doubt that he was unaware of any distinction between cases where the comparison is made by an inspector and those made by the commissioner or his law officer."

In the case at bar it appears that a delay in the case was desired so that the alien might have the opinion, advice and assistance of her counsel in this matter, and those benefits undoubtedly would have consisted in a further showing to counterbalance the effect of the evidence given by these two witnesses. Inspector Ainsworth conducting this hearing undoubtedly understood that a request for a

continuance was before him as is evidenced by his decision in the matter, in which he stated (Tran. 42):

> "I do not feel justified in holding it open any more, and will send the record as it appears to Washington, with the protest made by you being part of it."

In this connection we submit that the responsibility of conducting a fair hearing in a case of this kind rests upon the Government, and the regulation specifically provides in rule 22, subdivision 4, section b, that if evidence is offered by the Government after counsel has been accorded the alien, that *she may have an opportunity to offer evidence to meet any evidence therafter presented by the Government.* It was incumbent upon the inspector to afford a fair hearing, and to afford the alien an opportunity to meet this evidence which it is admitted and conceded he then for the first time presented to the attention of the alien, and his failure to obey the plain mandate of the rule deprived the alien of a fair hearing. It is no defense to say that these papers were formally in the record, because the record in this hearing shows that on October 10th that the record was given to the attorney for the alien, and that at that time this evidence was not contained in the case. If the Government thereafter presented any additional evidence, the obligation rested upon them to make known that fact to the alien and her attorney, and their failure to do so, and in withholding the said evidence until the

final hearing, and then affording no opportunity to meet the same, they deprived the alien of any opportunity to offset this evidence which the Government at the last moment presented in this case before transmitting the record to the Department at Washington. We submit that the hearing accorded as outlined herein is nothing but the semblance of a hearing, and has not accorded the alien a fair opportunity to meet the charge against her.

The final protest of the attorney for the alien upon this matter is comprehensive, and covered this point, and is as follows:

> "We desire to protest at this limitation upon the right of counsel and this abridgment on the ability of the defendant to properly present a full and adequate defense."

THIRD.

"The Court erred, in holding that it was not an abuse of discretion, and did not deprive the alien of a fair hearing, for the Commissioner of Immigration, after the close of the Government case against the said alien, the petitioner herein, to submit evidence to the department detrimental to the said alien, the said petitioner herein, which said detrimental evidence had been previously withheld from the said alien, the petitioner herein, and no opportunity at all afforded her at any time of meeting, or answering, the said evidence, which was clandestinely forwarded to the Secretary of Labor, and in so abridging and limiting the right of the counsel of the alien, as to prevent counsel from ascertaining all the evidence submitted

> against the said alien, the petitioner herein; all as more particularly alleged in the third specification of unfairness contained in the petition on file herein." (Tran. 8 and 9.)

The above specification has to do with the transmitting to the department of evidence against the appellant which has not been submitted to the appellant, and which she has no opportunity of answering. The trial Court in its opinion upon this matter decided that this point was well taken, and only held against it upon the question of procedure, the decision of the Court upon that point being as follows:

> "It is averred on information and belief that after the close of the case the Inspector submitted evidence detrimental to petitioner which she has never seen. If this be true, of course the hearing was unfair. But in proceedings like this, an averment of this nature is easily made, and I am not disposed to give it any attention, unless the reason for the belief, and the nature and the source of the information is set out, so that the Court may say whether there is any reasonable ground for the belief, or any basis for the information."

We desire to answer this by stating that we are not required to set forth in our pleading matters of evidence, but are only required to allege the ultimate fact, and that obviously the source of our information or the reason for our belief are questions of evidence as is also the question as to whether or not they did send such evidence to the department. We submit that good pleading re-

quires that such matters should be affirmatively alleged upon information and belief, and that when we have done that we have performed all that the law requires. It is thereafter incumbent upon the respondent to either deny or admit the allegation. The verification to the petition swears to the truth of everything contained in the petition excepting as to those matters alleged on information and belief, and as to those matters, she believes them to be true. We submit that upon this point the petition is sufficient to call upon the Government to make answer thereto.

There are not any adjudicated cases directly upon this point upon deportation cases, but the same principle is involved in incoming cases, save that in incoming cases the importance to the applicant for admission is that all the evidence submitted upon his behalf should be sent to the department while in deportation cases the importance to the person proceeded against is that he should see all the evidence presented against him, so that he might have an opportunity of answering the same. In cases of admission upon this point the Courts have already so adjudicated. Reference is made to the case of In re Can Pon, 168 Fed. 479, ~~recited~~ decided by this Honorable Court, in which the Court held, Judge Gilbert speaking (page 484):

> "But the applicant upon his appeal from the decision of the local officer was entitled to the benefit of all the material evidence which was before the inspector. To withhold any thereof, and to exclude it from the record on the ap-

> peal was to deny him the right of appeal which the statute gives him. The testimony of a witness which was on the whole favorable to the applicant's contention was by inadvertence omitted from the record on appeal, and was not considered on the hearing thereof. It makes no difference that such evidence was taken at the instance of the inspector, and that it never came to the attention of the applicant or his counsel; it was a portion of the evidence taken by the inspector as an officer of the government, whose duty it was to act impartially and to ascertain the truth as to the question at issue. A portion of the testimony so omitted was direct evidence to the effect that the applicant was born within the United States. The inspector discredited it, but the applicant was entitled to the benefit of it on the appeal. It is no answer to this to say that portions of the testimony of that witness tended to contradict certain statements of Look Wing. Having been denied the benefit of all the testimony taken upon the question of his right of admission to the United States, the applicant has been deprived of the right of appeal which the statute confers upon him, and he may, therefore, upon habeas corpus, test the legality of his imprisonment."

There is a dissenting opinion written by Judge Morrow, which, however, dissents solely upon the question of jurisdiction, and we desire to quote as follows from that portion of the decision which might be classed as concurring with the majority opinion (italics ours) (page 487):

> "In my opinion, all there is in this case is the question whether the method of procedure followed by the officers was due process of law. With respect to the omission of testimony from

the record on appeal to the Secretary of Commerce and Labor referred to in the opinion of the majority of the court, it is sufficient to say that this defect in the procedure was a lack of due process of law, and by reason of that fact, the omission of the testimony became known only by the proceedings in court upon the petition for a writ of habeas corpus. *Without such proceeding this testimony might never have come to the knowledge of the petitioner or his attorney.* A citizen of the United States returning from a foreign country and claiming the right to come into the United States as such citizen may never know under this procedure the testimony produced against him, may never have an opportunity to meet it, or to cross-examine the witness who may testify against him. Is this due process of law?"

FOURTH.

"The Court erred in holding that it was not an abuse of discretion, and did not deprive the alien, the petitioner herein, of a fair hearing for the immigration authorities to submit their evidence against the alien, the petitioner herein, in the form of oral examination from the witnesses prior to according the alien the right of an attorney and to thereafter present the evidence from the Government witnesess in the form of ex parte affidavits, thus preventing and depriving the alien, the petitioner herein, of any opportunity of being confronted with any witnesses being presented against her, and depriving her of any and all opportunity to submit evidence of said Government witnesses upon her own behalf; all as more particularly alleged in the fourth specification of unfairness contained in the petition on file herein." (Tran. 9 and 10.)

Upon this point we desire to submit that all of the matters submitted under the foregoing three points might really be considered as amplifications of different matters that might arise under this specification, and it is only in addition thereto that we need to submit some general observations and decisions. The Constitution of the United States of America provides that no person shall be charged with a crime or a misdemeanor, no matter how small, save upon the presentment of an indictment by a Grand Jury, and that he may not be convicted until after he has had a trial before a jury. The organic law of the United States further requires that in civil matters, where the controversy in dispute is even of the value of only a few dollars, that the right of jury trial shall exist. Is it possible or conceivable that the Congress of the United States, having before it the mandate of the Constitution, that litigants would not be compelled to submit such matters to be determined solely by a judge, if they desired a jury, that Congress should have given to a vast body of Immigration Inspectors such tremendous powers that they could themselves virtually determine matters of far greater importance in their consequence to the parties proceeded against than are many criminal prosecutions or civil suits, with such a small check upon the Immigration Inspector that he might by his conduct deprive the aliens of their right of residence in this country by devising a class of procedure which virtually precludes and prevents them from making any ade-

quate showing at all, or of attacking satisfactorily the showing made by the Government? When we take into consideration that the Supreme Court of the United States has decided in the case of Frick v. Lewis, supra, and more recently in the case of Lapina v. Williams, that the residence of an alien might be terminated, no matter how many years it had continued and also in the case of How Moy v. North, 223 U. S. 717, in which certiorari was refused by that Court, showing that these Immigration Inspectors might even determine the great question of citizenship; and I ask in view of these great matters that are entrusted to them, whether it is conceivable that they are to become and be a law unto themselves in proceedings of this kind? I expect that stress will be laid upon certain decisions of the Courts which arose from cases of *admission* in contra-distinction of those of *deportation,* and for that reason I desire to submit further observations upon that point. It should not take much to convince or show one that cases of admission and deportation stand upon an entirely different footing. The Chinese Restriction Acts themselves provide that in cases of admission the executive administrative officers shall have jurisdiction, but expressly provide in section 12 of the Act of May 6th, 1882, and section 13 of the Act of September 13, 1888, that deportation cases shall be tried before a justice, judge or commissioner, in other words, a judicial officer of the Government, where judicial procedure prevails and where a complete right of

counsel is accorded. It is of interest to note, therefore, when considering these different Chinese decisions, that the Chinese Restriction Acts themselves make this distinction: The right of a Chinese person to enter the United States was a summary proceeding and swift executive action was contemplated. It would hardly be a reasonable regulation in an admission case, in fact it would defeat the purpose of the law, if a complete right of counsel existed in an admission case, where witnesses must be examined at different places and examination conducted at widely divergent points. Would it be incumbent upon the Government to take an applicant for admission at the port of San Francisco back to the city of Boston or New York so that he might there be confronted with the witnesses there tesifying on the Government's behalf? Certainly such a requirement would lead to absurd results. In an admission case the applicant is not a defendant, no charge is brought against him, nor is he being proceeded against, but he is simply asked to state the grounds of his admission and what witnesses can testify for him, and then the witnesses are examined; whereas in a deportation case an entirely different situation confronts us. There the person is actually a defendant; there is a specific charge made against him which he must meet and he is being proceeded against. The very nature of these charges show that the evidence would almost invariably be close at hand to the place of the trial, and not scattered all over the length and breadth

of the country, as in admission cases. In all admission cases the applicants are held at the various ports of entry while their evidence is being examined at their former place of residence, which may be thousands of miles away, while in arrest cases the warrant is issued and the person tried in the locality where it is charged the offense took place. Another element which must not be lost sight of is the fact that admission and exclusion cases are dealt with under entirely different sets of regulations, and these regulations in turn have different statutory authority. In an admission case the applicant denied at the port of entry has a right of appeal in which he may inspect the entire record on which he has been denied and ascertain therefrom in what measure the evidence he has submitted has been found wanting, and he then has the right of submitting further evidence upon appeal to overcome these divergencies; he has the right to see the report on the said evidence and may thus know whether his evidence is even then sufficient, and if it is not, he still has the right to submit further evidence, until either the statutory requirement has been met or his supply of evidence exhausted; whereas in a deportation case the person proceeded against and his counsel are both prevented from seeing the reports and the conclusions of the examining inspector, and also the opinion of the Secretary or the different reviewing officers under the Secretary, and are only advised as to the ultimate decision. It is readily seen that what would

be a reasonable regulation in an admission case would be a very unreasonable regulation in a deportation case, and it was the recognition of this fact that different sets of regulations exist and a different mode and method of procedure is provided and established. In support of this contention we direct the Court's attention to the case of Davidson v. New Orleans, 96 U. S. 97, 107, wherein it is said:

> "If found to be suitable or admissible in the special case it will be adjudged to be 'due process of law', but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law'."

A further reason for this distinction is necessitated when we consider that the Immigration officer conducting the hearing in a deportation case usually acts as a "informer, arresting officer, inquisitor and judge". This language just quoted is from U. S. v. Williams, 185 Fed. 599, supra. In this connection it might be well to note that in the case of Hangs v. Whitfield, 209 Fed. 675, supra, the Court also comments upon the inspector "who acted as prosecutor and judge upon such hearing", while even in the case at bar, by referring to the record of the hearing annexed to the petition we find that Immigration Inspector-In-Charge Ainsworth is the arresting officer, prosecuting examiner and also the judge of that part of the hearing. (See caption to examination of each witness: Testimony Choy Gum, Tran. 15; Leong Toe, Tran. 17; Ton Yook Lou, Tran. 20.) When officers so vitally

interested are permitted to conduct these hearings, it is quite essential that the defendant should have a "substantial" right of counsel, and not a mere semblance of protection. In U. S. v. Williams, supra, page 603, the court, commenting upon the Immigration Inspector and the police officer, states as follows:

> "Who had any interest in dissuading them except Tedesco and Nicolay? Nicolay had originally made the charge, and Tedesco had preferred it. They both had the ordinary detective's belief in guilt and zeal for conviction. Tedesco appears at every turn in the transaction resisting all attempts of any counsel to see the aliens."

In the case of United States v. Redfern, 180 Fed. 500 there is an interesting part of the decision to which we desire to direct your attention, only first citing a part of the syllabus:

> "Held that, where there were only three immigration inspectors at a port where an alien attempted to land, the inspector who had examined her and had denied her right to enter was not competent to sit on a board consisting of three inspectors, of which such inspector was one, was illegal and without jurisdiction."

To lead up to and explain a part of the decision quoted, as follows:

> "It is fundamental in American jurisprudence that every person is entitled to a fair trial by an impartial tribunal, and a board of special inquiry constituted as in this case is at least open to suspicion. I do not believe the law contemplates that the inspector who makes

> the preliminary examination shall serve on the board of special inquiry, and I must hold in this case that the board which denied to petitioner the right to land was illegal and without power." * * *
>
> "The writ will be made absolute, and the relator will be discharged from custody."

This honorable Court's attention is further directed to the case of United States v. Sibray, 178 Fed. 144. Judge Orr, speaking at page 149, states:

> "After the arrest three separate hearings were had by the immigration inspector at which testimony was taken. At the first only was the relator present. Of the second and third he had no notice, although at each a witness was sworn and examined. Upon the testimony thus taken the order of deportation was issued. It is clear that such proceedings were contrary to law. The act provides for the production of the alien at the hearing or hearings. It is fundamental procedure that witness and accused be brought face to face, and it is also fundamental that opportunity for cross-examination should be given. I am therefore of opinion that the hearings were not held according to law."

This case is immediately followed by another case of the same title, 178 Fed. 150, in which Judge Orr, speaking at page 151, states:

> "Second. As in the Huber case, after the arrest there were three hearings, of two of which the relator had no notice and was not given an opportunity of being present, although at each of said hearings a witness was sworn and examined. For these reasons the hearings were not held according to law."

A very recent case and one which contains an appropriate finding, is the case of U. S. v. Redfern, 210 Fed. Rep. 548, Foster, District Judge, wherein, on page 550 thereof, it is held:

"(4) Under the provisions of the immigration act, these Chinese, though unlawfully in the country, could not be deported after three years. Disregarding the claim of three of them to be American citizens, from their own testimony all of them have been in the United States more than three years, and, while the immigration officers and Secretary of Labor perhaps might arbitrarily disregard this sworn testimony, still if that is eliminated from the case, there is nothing left. Congress has indeed vested the immigration officers with enormous power, subject to no check save their own consciences, but in granting them discretion to arrest and deport any person charged with being an alien and unlawfully in the country, I cannot believe that it was ever intended that they could do so arbitrarily, and without some evidence upon which to base their decision.

"Under ordinary circumstances, where the record shows clearly an alien is unlawfully in the country, but the warrant of deportation is defective, the Department of Labor should doubtless be afforded an opportunity of correcting its mistake, but in this case there would seem to be no good reason for so doing as the men can be rearrested under the provisions of the Chinese exclusion laws. And in that event they will have an opportunity of a trial in court, *where they may be represented by counsel in fact as well as in theory,* and will have compulsory process to obtain witnesses in their own behalf.

"The writs will be made absolute, and the prisoners discharged from custody."

It is regrettable that on the appeal taken in these two ~~last mentioned~~ preceding the last mentioned cases that the Circuit Court of Appeals did not pass upon the particular points here relied upon. It seems that there were three cases and they were all dismissed for the following reasons, citing Clay, Circuit Judge, 185 Fed., page 404:

> "The same order is made in the other cases named in the caption, to wit, Nos. 70 and 71; as, in both of them it appears by the return of the respondent that the relator was not in his custody or control, but was out on bail before and at the time of the service of the writ. The records in these two cases seem to disclose a situation of great hardship, as to both relators, and we venture to express the hope that, though the exercise of the discretion of the Secretary of Commerce and Labor and his subordinates, so far as it is authorized by law, is not subject to review in the courts, there may be found some way in which this hardship may in some degree be mitigated in the further exercise of that discretion."

Upon the question of examination or cross-examination of witnesses we desire to state that it is noteworthy that in the two cases of this character which have been before the Supreme Court, first, that of Low Wah Suey v. Backus, supra, and second, that of Zakonaite v. Wolf, 226 U. S. 272, in the cases sought to be reviewed by the Court, the right of examination and cross-examination was freely accorded to both parties to the controversy, thus showing that while the precise matter was not raised as a point before the Court, the